No. 9506

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

ILENE WARREN, ETC.

Appellant,

v.

TERRITORY OF HAWAII

Appellees.

BRIEF OF APPELLANT

On Appeal from the Supreme Court of the Territory of Hawaii

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Appellant

Filed this................day of September, 1940.
PAUL P. O'BRIEN, Clerk

By...
Deputy Clerk

FILED
SEP 19 1940
PAUL P. O'BRIEN,
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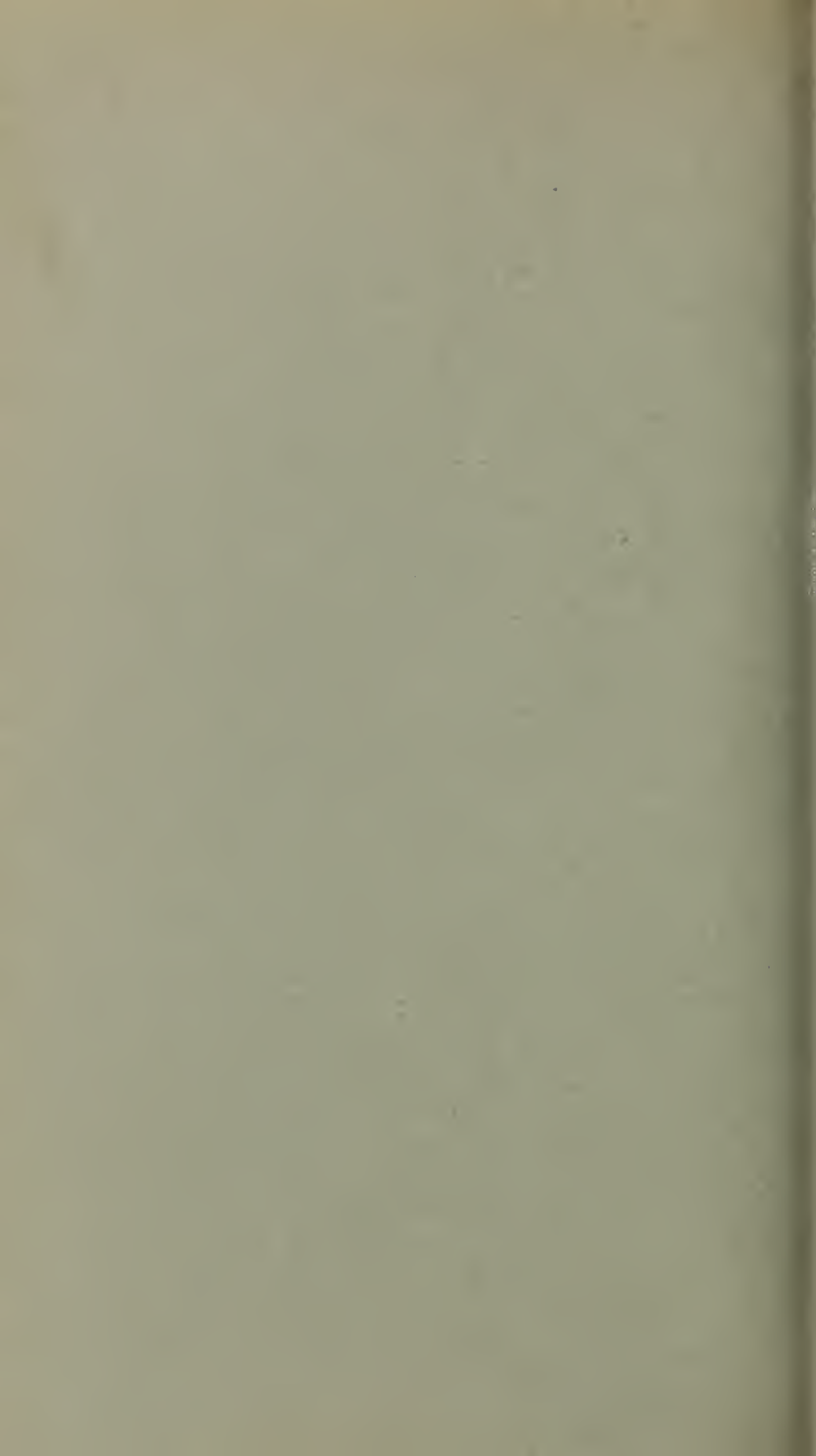

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BRIEF OF APPELLANT

On Appeal from the Supreme Court of the Territory of Hawaii

OPINION BELOW

The judgment of the Supreme Court of the Territory ›f Hawaii was filed on October 20, 1939, and the decision ıpon the petition for a rehearing was entered and filed on Ɲovember 25, 1939. (Rec. 647, 669.)

STATEMENT OF THE PLEADINGS AND THE FACTS

This cause has come to this Court upon the appeal of he defendant, ILENE WARREN alias "SPEED" WARREN, rom the judgment of the Supreme Court of the Territory

of Hawaii entered October 20, 1939 pursuant to a decision of said Court rendered and filed on October 20, 1939 dismissing the writ of error of defendant from the verdict, judgment and sentence of the Circuit Court of the First Judicial of the Territory of Hawaii, and sustaining the judgment and sentence of said Circuit Court.

The appellant invokes the jurisdiction of this Court under Section 128A of the Judicial Code as amended by Act of February 13, 1925 (28 U.S.C.A. Sec. 225).

The defendant was indicted on the 5th day of August 1937, by the Grand Jury of the Circuit Court of the First Judicial Circuit of the crime of murder in the second degree.

A plea of not guilty was entered by the defendant and the cause came on regularly for trial on the 2nd day of February, 1938, before the Circuit Court of the First Judicial Circuit, Honorable Louis Le Baron presiding, with a jury. At the conclusion of the evidence and after the argument of counsel and the instructions given by the Court, the Jury on the 18th day of February, 1938, returned its verdict finding the defendant guilty of manslaughter with leniency recommended.

The defendant excepted to the verdict and thereafter filed her motion for a new trial and supplemental motion for a new trial, both of which were denied by the Circuit Court to which rulings the defendant duly excepted and which exceptions were allowed by the Court. The defendant was sentenced to the term provided for the crime of manslaughter.

Thereupon the appellant gave notice both oral and written of her intention to sue out a writ of error to the Supreme Court of the Territory of Hawaii and within

the time prescribed by law, did apply for a writ of error.

Throughout the trial the Circuit Court committed manifest, material and prejudicial error in overruling objections interposed by the defendant to the admission of evidence by the prosecution, in sustaining objections of the prosecution to the introduction of material evidence by the defendant, in denying the motions made by the defendant and in granting motions made by the prosecution over the objection of the defendant, in giving to the jury certain of prosecution's requested instructions over the objection of the defendant, in refusing to give certain of defendant's requested instructions, in accepting and filing the verdict of the jury and in denying the defendant's motion for a new trial and supplemental motion for a new trial and imposing the sentence and judgment upon the defendant.

Exceptions being noted to the rulings of the Court as appears in the record and certain of which rulings, particularly the rulings involving Federal questions, is before this Court as appears in the assignment of errors on file herein.

The judgment and sentence of the Circuit Court having been sustained by the Supreme Court of the Territory of Hawaii, and the Supreme Court having denied the petition of the appellant for a rehearing, within the time provided by law, a petition for appeal, notice of appeal and assignments of error were duly filed and the appeal perfected from the judgment of the Supreme Court to this Honorable Court. The cause, therefore, is now before this Court for review.

The appeal to the Court below from the judgment and sentence of the Circuit Court of the First Judicial Cir-

cuit of the Territory of Hawaii, was by writ of error. By Statute (Sec. 3553 Chap. 100 R. L. of Haw. 1935) the judgment of the Circuit Court, the pleadings and such other papers and things including the verdict, rulings, notes of exceptions, motions, clerk's minutes and transcript of the evidence, all of which were designated in the praecipe filed by the plaintiff-in-error in the Court below, the appellant herein, became a part of the record of the cause in the Supreme Court of the Territory of Hawaii, and upon which record the Supreme Court determined the issues raised by the assignment of errors and upon which record the judgment of the Court below was based. The rulings, the errors alleged as to the admission or rejection of evidence, to the instructions given and the instructions refused, together with the grounds of objection urged at the trial, and the exceptions taken to the rulings of the trial Court, appear in full in the transcript of the evidence which is, under the Statute, a part of the record of the Supreme Court.

A bill of exceptions, therefore, under the practice in the Territory of Hawaii and under the Statute is unnecessary.

STATEMENT OF THE CASE

A complete transcript of the evidence being a part of the record in the Court below, the material portions of the evidence will be specifically referred to under the argument upon the assignment of errors where the same is applicable, and therefore, it will only be necessary to briefly set forth the statement of the case, setting forth the questions involved and the manner in which they are raised.

Prior to the actual trial the Court, upon the motion of the defendant, ordered suppressed all evidence obtained by the prosecution as a result of the illegal search of the premises of the defendant and the seizure therein of certain electrical apparatus, to-wit, the wiring, transformer, metal plate and other electrical attachments (Rec. p. 42).

The Territory of Hawaii called as its witnesses, Ernest Wm. Bell, who merely identified a map of the vicinity of defendant's home; Perry W. Parker, a police officer who testified that he had arrested the defendant on June 1st, 1936, more than a year prior to the alleged crime, and Alfred Fraga, Police photographer, who identified the photographs of the dead body of Wah Choon Lee, the victim of the alleged crime.

The Territory of Hawaii then called as its witness Lou Rodgers, who testified on direct examination, that she lived at Wahiawa; that she knew the defendant and had known her for four years; that she was present in the home of the defendant on June 1st, 1936; that she was working as a prostitute in the home of the defendant; that she went to the Police Station with police officer Parker on June 2nd, 1936 and while at the Police Station she had a conversation with the defendant in which the defendant stated that she wanted to wire the building with electricity and wanted to know what she thought about it and how to fix the place up on account of burglars and drunken soldiers and that the defendant told her that the electric equipment would help to get rid of the cops or to keep them away; that she was present at a conversation between the defendant and John Kiehm and that the defendant, in her presence, asked John Kiehm if he could install the equipment if she got the wire and material;

That thereafter the defendant procured the material and that John Kiehm installed the apparatus to the front and back doors and that the switch was located on the stairway.

Again the witness described the electrical apparatus and stated that the wires ran to the front door and the back door and described and located the switch and that after the installation, John Kiehm came back and fixed the transformer, put a larger one in the second time. She further stated that the defendant had, on occasions, put electric current through the equipment by turning on the switch.

On cross-examination the witness testified that she lived with the defendant prior to April 1936, when she departed for the Mainland; that she returned from the Mainland on May 22, 1936, and lived with the defendant until August 4, 1937, when she moved out; that while residing with the defendant, the defendant's home had been robbed and they were bothered continuously by drunken soldiers; that the witness was the only one who had been involved with the police.

Further testifying on cross-examination, the witness stated that the first time she ever made any statement to the police was subsequent to the death of Wah Choon Lee and only when she was questioned by Captain Hays at the Police Station and at which time Captain Hays exhibited to her the electrical equipment seized in defendant's home, which evidence was suppressed, and that every question he asked was based upon the said electrical equipment; that her entire statement made to the police was based upon certain equipment that was in her presence and in answer to questions regarding it.

On redirect examination the witness testified that when the police had her at the station, shortly after the death of Wah Choon Lee, they had some electrical equipment there and that it was the same equipment that was in defendant's home when the witness resided there and stated that was how the police got the lead and that the police then questioned her as to what she knew personally about that equipment, how she knew it was in the house, how it was put in and all such things; and all that she told the police was based upon her memory and her own observation and not what she saw at the Police Station.

The defendant moved to strike the testimony of this witness, upon the ground that the evidence was obtained as a result of an illegal search and seizure, that the knowledge of the existence of the equipment was gained only through an illegal search and that the information obtained by the police was used to obtain the evidence from this witness, and in violation of the defendant's rights under the fourth and fifth Amendments to the Constitution.

The trial court denied the motion, and the defendant duly excepted, and the exception was noted. At the conclusion of the case of the Territory the motion was renewed upon the same grounds and again denied by the trial court, to which ruling the defendant again excepted.

The Territory then called as its witness, John Kiehm who testified on direct examination as follows:

That he was a resident of Wahiawa; that he was an automobile mechanic; that on July 11, 1936, the defendant came to his garage and asked if he could install some device on the door so that the person opening it would receive an electric shock; that he told her he could; that

later he purchased a transformer and had it installed; that there was one wire leading to the front door and one to the back; the main wire led to a switch on the door panel; that he did not recall if he put the switch in but he connected the wires to the switch; that the main wire was connected to the fuse plug and the fuse plug was connected to the ordinary wire; that the transformer was located above the living room door, one wire led from the transformer to the front door, one to the back door and one to the ground located outside the house; that he had a conversation with defendant after the apparatus was put in concerning the wiring and how to operate it; that he was an auto electrician and studied electricity.

The witness then proceeded to draw the floor plan of the home of the defendant, locating thereon the front door, the stairways, the electric switch, the transformer, the fuse plug, the manner in which the wires were connected to the front and back doors, the wires to the ground and he also drew a larger diagram showing the entire circuit, marking thereon the fuse plug, transformer and switch and connections to the switch; and then proceeded to describe the switch and testified that it was a knife type switch, double throw, with two wires leading to the transformer; and again drew a diagram representing the approximate size of the transformer.

Again, the witness testified as to the dimensions of the transformer; that it was about four and one-half inches wide by six inches long and about two or three inches thick; that the line running from the transformer to the ground outside was marked on the plan and was connected to a pipe; that one line ran from the transformer to the front and another line to the back door and that the

ransformer was located above the door; that the wire eading to the front door was soldered onto the front screen and approached the screen from the right upper corner inside the house about an inch above the hinge.

On cross-examination the witness testified that he made a statement to the police after the police officer was killed and that he signed a statement at the Police Station; that it was the first statement that he had made concerning the case; that at the time that the statement was made, the police exhibited to him certain electric equipment which consisted of a transformer, some wires and a switch and that they were the same articles that he had put into the house of the defendant.

The witness further testified that in 1936 the defendant drove up to the shop and asked him if he could install some kind of a device on the front door to keep away soldiers because they came at all hours of the night and pounded on the door; that he told the defendant he could and further told the defendant that a transformer would give a shock; and that the installation of a transformer and some wires would give a shock; that the defendant asked him if he would guarantee that it would not kill and that he told the defendant that the shock was not strong enough to harm a person and that the defendant then asked him to install the apparatus.

On redirect examination the witness testified that all of his evidence theretofore given was from his own memory of what happened and what he had put in the house, and was not influenced by what the police told him.

On recross examination the witness testified that the police showed him the equipment and asked him what he

knew about that equipment and then the witness started to tell his story.

The defendant then moved to strike the testimony of the witness upon the ground that it was based upon information procured during an invalid search and that the testimony tended to incriminate the defendant under the fifth amendment to the Constitution and was obtained in violation of the defendant's rights under the fourth Amendment of the Constitution, and also that the testimony was procured in violation of law. The motion was denied by the trial Court, and an exception was duly taken and noted to the ruling of the trial Court. The motion to strike was renewed at the conclusion of the Territory's case and again denied by the trial Court. An exception was duly taken and noted to the ruling of the Trial Court.

Prosecution's witnesses Lucy McGuire, a maid in the home of defendant, and James P. Michels, an employee of the Hawaiian Electric Company, Limited, gave testimony, not however, material to the issues raised by this appeal.

The Territory then called, as its witness, Edward J. Burns, and upon being duly sworn, testified as follows:

That he was a police officer, having joined the department on November 16, 1936, and worked as a foot patrolman; that on August 3, 1937, he was assigned to special duty with Captain Caminos at Wahiawa; that he was assigned by Captain Mookini to go with Captain Caminos to raid the house of the defendant; that he left Honolulu at 5:30 P.M., arrived at Wahiawa and left the Wahiawa Station at 8:45 P.M. in company with Captain Kalauli,

Captain Caminos, Officer Chun, Officer Apoliana and Officer Wah Choon Lee, the deceased.

The witness then testified that a group of seven officers left the Police Station at Wahiawa; that he separated from the group and went to defendant's place; that he wore a grey suit and black shoes and that all of the other officers were also in civilian clothes; that on reaching defendant's home he knocked on the wall next to the door; no one answered so he returned to the street; that he walked back and again knocked; that he saw a woman look out of a window and heard footsteps; the door was opened and he was let in by a woman, Billie Penland, who greeted him with a "hello"; that he followed her into the parlor and stopped by a wicker table where she asked a question, then he followed her into a room where there was a bed, dresser and washstand, and as she stood by, the witness took off his tie, started to remove his coat and then had a conversation as a result of which he gave the woman three dollars; that the woman took the three dollars and left the room and took with her a basin of water, when she returned he was undressing, she left and returned again when he had completed undressing; she went to the bed and removed her robe and sat on the bed; that he then reached for his clothes, took out a handkerchief, police badge and a whistle, blew the whistle three times, showed her the badge and told her she was under arrest for investigation; that he blew the whistle because that was a prearranged signal between Captain Caminos and his men and the witness that they were to raid the house; that the defendant came to the door after the whistle was blown and said, "what is the big idea of breaking into a respectable house this way?"

At the conclusion of the case for the Territory of Hawaii, the defendant moved to strike the testimony of this witness Burns upon the ground that it was procured in violation of the defendant's rights under the fourth and fifth Amendments to the Constitution of the United States, which motion was denied by the trial Court and to which ruling an exception was duly taken and noted.

The Territory then called as its next witness, Billie Florence Penland, and upon being duly sworn, testified as follows:

That she was acquainted with defendant and lived with her and was working for her as a prostitute on August 3, 1937, on which day there was a raid; that Officer Burns was there, that there was a knock at the front door, the defendant looked out of the window and told the witness to go down and let him in, saying it was okeh; that she went down and opened the door and let Officer Burns in; that they went to the reception room and then to another room; that the officer blew a police whistle and someone banged on the door; that the defendant came to the door; that she saw the defendant again on the front porch when there was a struggle with the officer, the defendant was there too; that she ran upstairs and later saw the defendant upstairs, when defendant told her to go into the closet and stay there; that there was an officer upstairs and that the defendant told her she turned the switch.

On cross-examination the witness testified that while she was held at the police station, the police showed her some wire, equipment, and a transformer and then they began to prod her and that she was hesitant about making any statement to the police because she wanted to protect the defendant until the wires, transformer and door were

shown to her and then they compelled her to tell what she knew about the door.

On redirect examination the witness stated that all she testified to was based upon her memory of what happened on the night of August 3, 1937.

Upon the completion of the testimony of this witness, the defendant moved to strike her testimony upon several grounds, among which was that the evidence was obtained in violation of the defendant's rights under the fourth and fifth amendments to the Constitution, which motion was denied and to which ruling an exception was duly taken and noted. The motion to strike was renewed at the close of the case for the Territory and again denied. An exception was duly taken and noted to the ruling of the Trial Court.

Witnesses for the Territory, Marjorie Scott, an occupant of the home of the defendant, Charles W. Erpelding and William L. Odle, Sergeants in the United States Army testified to matters not material to the issues raised by this appeal.

The Territory then called, as its witness, Clarence C. Caminos, who, upon being duly sworn, testified that he was Captain of the Vice Squad of the Honolulu Police Department; that on August 3, 1937, in company with seven officers he left the Police Station and went to the defendant's home; that he was in command; that he told the two officers stationed in back that the signal would be a blast of a whistle and that they were to guard the place; that the witness and the other officers were stationed in front and when the whistle blew, he ran to the front door of the house and kicked the door and noticed it opened out and so he told the other officers not to kick the door;

that Officer Wah Choon Lee then rushed the door and grabbed the metal part; that he heard a yell, saw the officer fall backward; that he turned and looked and saw the officer in the arms of Captain Kalauli and when he turned again the door was open and the defendant was standing there and Officer Burns was also standing there.

On cross-examination the witness testified that he went to Wahiawa to make a raid on the defendant's home, and that he was ordered to do so by the Chief of Police, without any search warrant; that he sent officer Burns into the house to try to make a case of prostitution, to go in and give three marked dollars, after which he was to make an arrest and then blow the police whistle; that he was not to have intercourse with anyone. The witness again stated that he told Officer Burns to go in and make a case and if he felt that an arrest should be made for some kind of violation, to place the people under arrest and to notify the officers outside by a blast of the whistle; that as he approached the front door he said, "Open up—police officers"; that about ten years before the defendant had been arrested for a liquor violation and that the only conviction was for the said liquor violation; that he knew of his own knowledge that defendant had never been convicted of running a house of ill fame; again the witness stated that his instructions to Burns was to get into the house and if he felt he had sufficient evidence, to make the arrest; then blow his whistle so that he and the other officers could arrest.

The Territory of Hawaii then called as its next witness, Francis Apoliona, who upon being duly sworn, testified as follows:

That he was a police officer on August 3, 1937; that, in

company with six other officers he went to raid "Speed" Warren's place; that he was stationed in the back of the house to cover anyone who left the premises; that he heard the police whistle and ran into the yard and stayed in back; that later he saw Wah Choon Lee in front of the house; that he picked Wah Choon Lee up and placed him in a car and took him to the hospital at Schofield Barracks.

The Territory of Hawaii then called as its witness, James S. Taylor, who upon being duly sworn, testified that he was a Captain in the Medical Corps; that on August 3, 1937, he examined the body of Wah Choon Lee and that he was dead.

The Territory of Hawaii then called as its witness, Kam Yuen, who upon being duly sworn, testified that he was a police officer; that on August 3, 1937, he was on special duty to go on the raid; that Captain Caminos was in charge; that he was with Captain Caminos in front of defendant's house; that when he got to the front door of defendant's house Captain Caminos announced they were police officers and asked "Speed" to open the door; that the door was being opened and that they heard a scuffling sound, and when the door opened the defendant was there; before the door opened, Captain Caminos said not to kick the door; that Officer Lee started to pull the door and that Lee let out a scream or yell and fell backwards into Captain Kalauli's arms; that Lee was standing on a metal mat; when the door opened, Captain Caminos ordered him to assist Officer Burns; that he went upstairs and saw the defendant there; that he was assigned to guard the premises.

On cross-examination, this witness testified that the offi-

cers went to defendant's house to raid; that when Burns was ready he was to give a signal—a blast of a whistle; that there was no fight between the defendant and Burns when the door opened; that he asked Burns if he needed help and he said no.

The Territory of Hawaii then called as its witness, David Liu, who upon being duly sworn, testified that he was a medical doctor and acting coroner's physician; that he performed an autopsy upon the body of Wah Choon Lee; that the only external injury was an evulsion of the skin on the right thumb, a loss of some skin; that he found the brain congested; the heart was contracted and revealed pertechial hemorrhages and the organs of the abdomen were congested; that from the autopsy he could not say what caused the death; that from the history of the case, he concluded that death was caused from electric shock.

The Territory of Hawaii then called as its witness, Levi Kalauli, who upon being duly sworn, testified that he was a Captain of Police, stationed at Wahiawa; that he knew the defendant for five years and was well acquainted with her; that on August 3, 1937, the police conducted a raid on the home of the defendant; that accompanying him were six other officers; that Captain Caminos, Officers Kam Yuen and Wah Choon Lee were on the Officer Burns knocked, the door was opened and he walked in; a few minutes later a police whistle blew, he ran to the door of the house, there was a little noise in the house, Officer Caminos called, " 'Speed' Warren open the door, we are police officers." Officer Caminos kicked the door followed by Officer Lee; Officer Lee reached for the top of the door, he started to yell, he was leaning back-

ward, finally he was released and he fell right into the witness' arms; that he dragged Wah Choon Lee away and worked on him; that he left for the station for his car; that he ran to the station and found one of his officers there and ordered him to take the car to the home of the defendant; that he then made his report; that he was not in command of the other officers and that the investigation was conducted by Captain Caminos; that he did not enter defendant's home.

On cross-examination the witness testified that the investigation was in charge of Captain Caminos; that there was a discussion before the raid and that the purpose was to raid "Speed" Warren's place; that they did not have a search warrant and that no discussion was had about a search warrant; that the instructions were to rush the place when the whistle blew.

The Territory of Hawaii then called as its witness, James S. Bunnell, who upon being duly sworn, testified that he was an electric meter engineer; that in his opinion a three way wire carrying a voltage of 115 volts was considered dangerous and that electricity at all voltages was dangerous.

The Territory then called as its witness, Robert B. Faus, who upon being duly sworn, testified that he was the City and County Physician and a medical doctor; that in his opinion, the deceased died from electrocution.

The Territory then called as its witness, Young Choon Lee, who upon being duly sworn, testified that he was a brother of Wah Choon Lee; that the said Wah Choon Lee was dead and that he last saw the deceased alive on August 3, 1937.

The Territory then concluded its case in chief.

Thereafter the defendant called as her witnesses Charles B. Dwight, Kenneth Young, Harry A. Wilder and Edward A. O'Connor, whose testimony is not material to the issues raised by this appeal.

Jacintho Paulos, a witness for the defendant testified that there was in the defendant's yard, a "No Tresspassing" sign which was clearly visible from the street.

Thereafter the Territory of Hawaii and the defendant offered certain proposed instructions. The Territory of Hawaii offered Prosecution's Requested Instruction No. 12, reading as follows:

> "You are instructed that Section 5404 of the Revised Laws of Hawaii 1935 provides as follows:
>
> > 'Policemen, or other officers of justice, in any seaport or town, even in cases where it is not certain that an offense has been committed, may, without warrant, arrest and detain for examination such persons as may be found under such circumstances as justify a reasonable suspicion that they have committed or intend to commit an offense.'
>
> "You are hereby instructed that the term 'reasonable suspicion' as used in said statute is construed by the Court to mean probable cause.
>
> "You should consider this law together with all the evidence in the case in determining whether or not the deceased, Wah Choon Lee, was lawfully upon the premises of the defendant at the time in question."

The defendant objected to the instruction upon the ground that the instruction violated the Fourth and Fifth Amendments to the Constitution of the United States in that the said section permitted arrests to be made in both

felonies and misdemeanors upon reasonable suspicion and that the said section makes no distinction of the right to make an arrest without a warrant in case of felonies and in case of misdemeanors; and that Section 5404 of the Revised Laws of Hawaii, 1935, being in contravention of the said Amendments to the Constitution, was null and void. The objections of the defendant were overruled and the objections were duly noted and upon the same having been given to the jury an exception was duly noted.

Thereafter the Territory offered Prosecution's Requested Instruction No. 12A reading as follows:

> "You are instructed that if you believe from all the evidence and beyond a reasonable doubt that the deceased was acting as a police officer and that he went upon the premises of the defendant for the purpose of assisting another police officer, and that the deceased in so doing acted under such circumstances as would justify a reasonable suspicion based upon probable cause that some person or persons upon the premises had committed or intended to commit an offense against the laws of the Territory of Hawaii, then you must find under such circumstances that the deceased, Wah Choon Lee, had a lawful right there and it was his duty to enter upon the premises of the defendant and you must not under such circumstances consider the deceased a trespasser."

to which offer the defendant objected upon the ground that the instruction violated the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States in that under said instruction, an arrest in a misdemeanor could be made upon probable cause and not only when committed in the presence of the arresting officer, which objection was duly noted and over-

ruled by the trial Court, the objections thereto being noted during the consideration of the instructions in chambers and upon the same being given to the jury an exception was duly noted in open Court.

Thereafter the Territory of Hawaii offered Prosecution's Requested Instruction No. 14, reading as follows:

> "You are instructed that if you believe from all the evidence and beyond a reasonable doubt that the deceased was acting as a police officer and that he went upon the premises of the defendant for the purpose of arresting and detaining for examination such persons as he might have found thereon, and that the deceased in so doing acted under such circumstances as would justify a reasonable suspicion based upon probable cause that some person or persons upon the premises had committed or intended to commit an offense against the laws of the Territory of Hawaii, then you must find under such circumstances that the deceased, Wah Choon Lee, had a lawful right there and it was his duty to enter upon the premises of the defendant and you must not under such circumstances consider the deceased as a trespasser.
>
> "And in this connection you are further instructed that the fact as to whether or not there was a 'No trespassing' sign upon the premises at the time, would not alter the right of the deceased, Wah Choon Lee, or the other police officers with him, to be upon the premises in question."

to which offer the defendant objected upon the ground that the instruction violated the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States upon the ground that it permits a police officer to enter a private home to make arrests upon suspicion alone, and to make an arrest in the case of a mis-

demeanor although the offense was not committed in the officer's presence, and that the jury was permitted to consider all of the evidence in the case not limiting the jury to such facts as may have been comprehended by the arresting officer, in determining the question of whether or not a legal arrest was about to be made, which objection was overruled by the Court and the objection noted during the consideration of the instructions in the chambers of the Court, and when the said instruction was given the jury, the defendant duly excepted.

Upon the same subject the defendant offered in evidence Defendant's Requested Instruction No. 16, reading as follows:

> "You are instructed that a police officer may arrest without a warrant one guilty of a misdemeanor only if the misdemeanor is committed in the officer's presence."

which instruction dealt with the legality of arrest and the manner of making the same which instruction was objected to by the Territory of Hawaii because it was in conflict with Section 5404 of the Revised Laws of Hawaii 1935, and which objection was sustained and the instruction refused by the Court, which objection and the action of the Court thereon was duly noted, in chambers, and an exception to the Court's ruling was duly noted in open Court.

Thereafter the defendant offered Defendant's Requested Instruction No. 18 upon the same subject and reading as follows:

> "You are instructed that to justify an arrest for a misdemeanor without warrant it must have been committed in the officer's presence, and it is so com-

> mitted, where he can by the exercise of his own senses detect it; but mere suspicion is not enough."

which instruction was objected to by the Territory of Hawaii upon the ground that the said instruction was in conflict with Section 5404 of the Revised Laws of Hawaii 1935, and which objection was sustained by the Court and the requested instruction refused, which objection and refusal by the Court was duly noted in chambers, and an exception to the Court's ruling was duly noted in open Court.

The jury after having deliberated for more than twenty-four hours returned to the Court room with their verdict which, omitting the title of the Court and cause, and signature, reads as follows:

> "We the Jury, in the above entitled cause, find the defendant Guilty of Manslaughter, Leniency Recommended."

Whereupon the defendant duly excepted to the verdict upon the ground that it was contrary to law, the evidence and the weight of the evidence, and the exception was noted.

SPECIFICATIONS OF ASSIGNED ERROR

The Appellant relies upon the following numbered assignment of errors; I and II appearing on page 9 of the record, III appearing on pages 10 to 13 of the record, IV appearing on pages 14 to 17 of the record, V appearing on pages 17 to 22 of the record, VI appearing on pages 22 to 24 of the record; VII appearing on pages 24 to 26 of the record; VIII appearing on pages 26 to 28 of the record; IX appearing on pages 28 to 30 of the record; X appearing on pages 30 to 31 of the record;

XI appearing on pages 31 to 33 of the record; XII appearing on pages 33 of the record and XIII appearing on pages 33 to 34 of the record.

ARGUMENT

The assignment of errors raises only two issues of law, the first involving the admissibility of the testimony of the witnesses for the Appellee, Edward J. Burns, Lou Rodgers, John Kiehm and Billie Florence Penland set forth in assignment of errors numbered III to VI inclusive and the second concerning the propriety of the trial Court in giving to the jury over objection and exception prosecution's requested instructions 12, 12-A and 14; and of the refusal of the Trial Court to give to the jury, Appellant's requested instructions numbered 16 and 18 as set forth in assignment of errors VII to XI inclusive.

The first issue involves the constitutional question of whether or not the appellant's rights under the Fourth and Fifth Amendments to the Constitution of the United States were violated by the admission of the testimony of the said witnesses.

The second issue involves the question of the constitutionality of Section 5404 of the Revised Laws of Hawaii, 1935. If the admission of the evidence of the said witnesses violated Appellant's rights under the Constitution or if the said Section 5404 of the Revised Laws is unconstitutional then the assignments of error referred to above and the assignments of error numbered I, II, XII and XIII should be sustained by this Honorable Court.

III.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING AND FINDING THAT THE EVIDENCE OF EDWARD J. BURNS, A WITNESS FOR THE TERRITORY OF HAWAII,

CONCERNING HIS OBSERVATIONS IN THE HOME OF THE DEFENDANT, WAS COMPETENT AND ADMISSIBLE AND IN SUSTAINING THE RULING OF THE CIRCUIT COURT OVERRULING THE OBJECTIONS OF THE APPELLANT TO SAME AND IN DENYING APPELLANT'S MOTION TO STRIKE UPON THE GROUND THAT THE ENTRY INTO THE HOME OF APPELLANT WAS ILLEGAL AND VIOLATIVE OF THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION.

The witness Burns testified that he was a police officer and was assigned to raid the home of the Appellant (Rec. p. 239); that he was accompanied by six other officers; that he made the entry into the home alone and then proceeded to testify as to what he observed in the home of the Appellant, which testimony was allowed by the Court over the objection of the Appellant.

Captain Caminos, also a witness for the Territory, and in command of the police, testified that they went to Wahiawa to raid the home of Ilene Warren by order of the Chief of Police (Rec. p. 416) without any search warrant. Captain Levi Kalauli, Captain of the Wahiawa District, also testified that they were to raid the home of Appellant (Rec. p. 515).

The Appellant respectfully contends that the evidence adduced by Burns of his observations in the home after his entry without a warrant or other lawful process and without the consent of the Appellant, and even with Appellant's consent without disclosure of the character and purpose of the entry, was error and that by the admission of the evidence the Appellant's rights under the Fourth and Fifth Amendments to the Constitution of the United States were violated.

The uncontroverted fact is that Officer Burns entered the premises of the Appellant for the purpose of gathering evidence against her (Rec. p. 240). Any information

he gathered as a result of that entry and search, concerning which information he testified to at the trial, was entirely inadmissible.

In *Gouled vs. U.S. 255 U.S. 298* the Supreme Court of the United States held:

> "That entry in to the private office of the defendant through stealth was in violation of the Fourth Amendment and evidence gained as a result of such entry was inadmissible."

In the Case of *Amos vs. U.S. 255 U.S. 313,* the Supreme Court of the United States again held:

> "That evidence obtained by a federal officer upon an illegal entry was inadmissible even though the entry was consented to by the wife of the defendant."

The Supreme Court of Hawaii in the Case of *Terr. vs. Ho Me 26 Haw. 331* held:

> "That entry into the defendant's home by a federal officer for the purpose of gathering evidence was illegal and the evidence obtained as a result thereof was inadmissible even though testified to by a witness who did not violate the search and seizure clause."

Finally in the case of *People vs. Dent* 19 N. E. (2) 1020 the Supreme Court of Illinois had before it a question similar to the one at the bar. In that case two police officers suspected the defendant of running a policy game and visited her home in July 1937. In response to their ringing the door bell someone in the house said "Come in." They entered, found defendant and a woman companion at a table in the dining room. On the table in open view, were the book numbers and slips; these the officers seized as evidence and arrested defendant. When the

officers stood at the door, the defendant could not see them. The identity of the police officers was not disclosed to defendant until they were in her presence. They did not have a search warrant.

In passing upon the question of the admissibility of the evidence that Court said, at page 1022:

> "Here the officers did not disclose their identity when seeking admission to the home of the defendant. Under the circumstances their actions were fraudulent and even if she had given them permission to enter in ignorance of their official character and purpose, such entrance would have been illegal."

It is clear from the evidence that Officer Burns was ordered to gain entry into appellant's home to gather evidence, and to gain such entry, through stealth he disguised himself in civilian clothes (Rec. 242) without disclosing the official character and purpose of the entry and was admitted by an occupant of the house, not the appellant, and which admission was not upon the invitation of appellant or occupant.

It is therefore respectfully submitted that the evidence of Officer Burns, objected to by Appellant, was incompetent, irrelevant and immaterial, that the admission thereof by the trial Court constituted reversible error, and that the Supreme Court of Hawaii erred in holding and finding that such evidence was competent and admissible and in sustaining the ruling of the trial Court.

IV.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING AND FINDING THAT THE EVIDENCE OF LOU RODGERS, A WITNESS FOR THE TERRITORY, THE KNOWLEDGE OF WHICH EVIDENCE, WAS GAINED BY THE POLICE AS A RESULT OF INFORMATION OBTAINED BY THE POLICE THROUGH AN ILLEGAL SEARCH AND SEIZURE, WAS COMPETENT AND ADMISSI-

BLE, AND THAT THE ADMISSION OF SAME DID NOT VIOLATE APPELLANT'S RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION AND IN SUSTAINING THE DENIAL BY THE TRIAL COURT, OF APPELLANT'S MOTION TO STRIKE UPON THE GROUND THAT THE TESTIMONY WAS OBTAINED AS A RESULT OF AN ILLEGAL SEARCH, THAT THE ADMISSION THEREOF INCRIMINATED APPELLANT UNDER THE FIFTH AMENDMENT AND VIOLATED APPELLANT'S RIGHTS UNDER THE CONSTITUTION AND THE FOURTH AND FIFTH AMENDMENTS THEREOF.

V.

THAT THE SUPREME COURT ERRED IN HOLDING AND FINDING THAT THE EVIDENCE OF JOHN KIEHM, A WITNESS FOR THE TERRITORY, CONCERNING THE ELECTRIC EQUIPMENT IN THE HOME OF THE DEFENDANT WAS COMPETENT, RELEVANT, MATERIAL AND ADMISSIBLE AND IN SUSTAINING THE CIRCUIT COURT'S RULINGS OVERRULING THE OBJECTION OF THE DEFENDANT AND DENYING DEFENDANT'S MOTION TO STRIKE UPON THE GROUND THAT THE SAME WAS BASED UPON INFORMATION PROCURED DURING AN INVALID SEARCH AND THEREFORE TENDED TO INCRIMINATE THE DEFENDANT UNDER THE FIFTH AMENDMENT AND WHICH EVIDENCE WAS OBTAINED IN VIOLATION OF DEFENDANT'S RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

VI.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING AND FINDING THAT THE EVIDENCE OF BILLIE FLORENCE PENLAND, TO THE EFFECT, THAT DEFENDANT PULLED THE SWITCH, WAS COMPETENT AND ADMISSIBLE AND IN SUSTAINING THE RULING OF THE CIRCUIT COURT IN DENYING DEFENDANT'S MOTION TO STRIKE, WHICH MOTION WAS BASED UPON THE GROUND THAT THE EVIDENCE WAS OBTAINED IN VIOLATION OF DEFENDANT'S RIGHTS UNDER THE CONSTITUTION.

The Assignments of Error immediately above involve but one issue of law and will therefore be combined for the purpose of argument.

These Assignments of Error concern the question of the admissibility of the evidence given by the witnesses, Rodgers, Kiehm and Penland concerning the electrical equipment in the home of the Defendant, which evidence was procured from the witnesses by the police after they had obtained knowledge of the existence of the equipment

through its seizure in the home of the Defendant, upon an illegal search and which equipment as evidence was ordered suppressed by the Court.

It is the respectful contention of the Defendant that the evidence was inadmissible and incompetent and that the admission of the testimony violated the Defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States.

Assignment of Error No. IV involves the admissibility of the testimony of LOU RODGERS; No. V involves the admissibility of the testimony of the witness JOHN KIEHM and No. VI involves the admissibility of the testimony of the witness BILLIE FLORENCE PENLAND.

It will be remembered that the Trial Court held the entry by the officers into the Defendant's home to be illegal and ordered suppressed the evidence found therein, which evidence consisted, among other things, of the electrical equipment and which equipment was exhibited to the witnesses at the police station and upon which the police based their questions and thereby obtained the evidence adduced by the witnesses later in Court.

In regard to this matter the witness LOU RODGERS testified as follows:

"Q. The first time you ever gave any statement to the police authorities was subsequent to the death of Wah Choon Lee, isn't that correct, after that?
A. It was while Mrs. Warren was in jail. I don't know.
Q. It was after the death of Wah Choon Lee?
A. Yes.
Q. And you were questioned in the police station by Captain Hays?
A. Yes.

Q. And at that time Captain Hays exhibited to you certain electrical equipment?

A. Yes.

Q. And every question that he asked you was based upon that electrical equipment, wasn't it?

A. Yes."

Rec. p. 141–142

"Q. Now this entire statment, Miss Rodgers, that you made to the police was based upon certain equipment that was in your presence and they were questioning you about it, isn't that correct?

A. Yes."

Rec. p. 151

Miss Rodgers further testified as follows:

"Q. Miss Rodgers did you tell the police at the time you were questioned by them that it was Mr. Kiehm who put the equipment in?

A. I don't remember if I did.

Q. You don't remember?

A. Speaking or writing.

Q. Speaking or writing.

A. I don't remember because I came out of the show —one evening going to the show, an officer asked me if I knew. I said I didn't. He asked me if it was Kiehm. I said it was the garage man. At that time I did not know his last name; all I knew him by was John.

Q. In other words, they asked you who put the electrical equipment in; you said it was John?

A. I said it was the garage man.

Q. Then you said it was John.

A. Yes."

Rec. p. 157–158

The testimony of the witness JOHN KIEHM pertaining to this issue is as follows:

"Q. Now, Mr. Kiehm, did you sign a statement at the police station when you made this statement?
A. I did.
Q. That was the first statement you made concerning this particular incident?
A. That is right.
Q. And at the time that that statement was made, did they show you certain electrical equipment at the police station?
A. Yes.
Q. That consisted of a transformer?
A. Yes.
Q. That consisted of some wires?
A. Yes.
Q. And that consisted also of a switch?
A. Yes.
Q. And they were the same articles that you testified here on direct examination that you put into the house?
A. Yes."

Rec. p. 190

On re-cross examination Mr. Kiehm further testified as follows:

"Q. Mr. Kiehm, you testified on cross-examination that the police showed you this equipment?
A. Yes.
Q. And asked what you knew about it, isn't that correct?
A. Yes.
Q. And then you started to tell them your story; isn't that what happened?"

Rec. p. 192

The witness BILLIE FLORENCE PENLAND testified concerning the issue raised by these Assignments of Error as follows:

"Q. And while you were held down at the police station did they show you any wire, equipment transformers and things like that?

A. Yes, sir.

Q. And they began to pump you?

A. Yes, sir.

Q. And you never talked until they showed you those things?

A. Well, I didn't intend to tell the truth for a while. Mrs. Warren had been very good to me, so I did want to protect her to a certain extent.

Q. So you did not say anything to the police until they flashed the electric wires, transformers and door?

A. Yes.

Q. And they compelled you to tell them what you knew about the door, is that correct?

A. Yes."

Rec. p. 337

It is apparent from the quoted testimony that the evidence concerning the electrical equipment was obtained through knowledge acquired from the evidence which was seized illegally.

The Fourth Amendment to the Constitution of the United States reads as follows:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the

place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor shall any person * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

The Supreme Court of the United States, has on numerous occasions, said: "The Fourth and Fifth Amendments must be liberally construed in favor of the accused."

Weeks vs. U.S. 232 U.S. 383.58 L. Ed. 652.
Amos vs. U.S. 255 U.S. 313.
Gouled vs. U.S. 255 U.S. 298.

The Supreme Court of Hawaii has said concerning these Amendments:

"It would not be possible to add to the emphasis with which the Supreme Court in the above cases has declared the importance of keeping unimpaired the rights secured to the people by these two amendments."
Terr. v. Ho Me 26 H. 331. 335.

The Supreme Court of the United States in *Silverthorne Lumber Company vs. U.S. 251 U.S. 392. 64 L. Ed. 319* held that any evidence obtained through an illegal search, or any knowledge gained from such evidence, was inadmissible as violative of the Defendant's rights under the Fourth and Fifth Amendments.

In the Silverthorne Lumber Company case, the agents of the government illegally seized documents belonging to the Silverthorne Lumber Company and after having obtained knowledge of the fact of their existence and their

contents, attempted by subpoena to procure that evidence. The government contended in that case that:

> "Although the seizure was an outrage which the government now regrets, it may study the papers, before it returns them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the constitution covers the physical possession but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act."

But the Supreme Court properly rejected that contention by saying that:

> "The essence of the provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all."

P. 321.

See also *Nardone vs. U.S. 84 L. Ed. 227 at 229.*

The most recent case on the subject is that of Nardone vs. United States. It was first decided by the Supreme Court in 302 U.S. 379, 82 Law. Ed. 314. The Third Circuit Court of Appeals was reversed because it sustained the trial Court's ruling admitting in evidence information obtained by tapping wires.

The case again reached the Circuit Court of Appeals upon a second conviction,—106 Fed. (2) 41. The main issue raised was whether the trial judge improperly refused to allow the accused to examine the prosecution as to the uses to which it had put the information unlawfully gained, that is, what part of the evidence introduced was indirectly procured as a result of tapping the wires. (See page 42 of the decision.)

The Circuit Court of Appeals said, in disposing of the question—

"Where evidence is obtained by means of an ordinary crime, the Court will not look beyond the character of the evidence itself and other evidence obtained as a result of the crime is not rendered inadmissible, the common law rule prevailing in such case."

The Supreme Court, however, again reversed the Circuit Court of Appeals and said:

"To forbid the direct use of methods thus characterized, but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' "

Nardone vs. U. S. 84 L. Ed. 227, 229 and in determining the question the Supreme Court said:

"Here as in the Silverthorne case, the facts improperly obtained do not 'become sacred and inaccessible.' If knowledge of them is gained from an independent source, they may be moved like any others, but the knowledge gained by the government's own wrong cannot be used by it 'simply because it is used derivatively.' "

P. 1229.

In the case at bar, because of the Constitutional objection, the electrical equipment and apparatus was ordered suppressed consistent with the law as set down by the Supreme Court. The Appellee, however, notwithstanding the decision, used the evidence and the knowledge gained therefrom, not in Court but for the purpose of extracting from other witnesses evidence concerning the equipment and proceeded to and did offer in evidence a full and complete description of the equipment.

The fact, that the testimony regarding the electrical equipment by these witnesses, was obtained by Appellee as a result of knowledge gained through an illegal search and seizure and derivative of it, is conclusively shown by the evidence. First, the electrical equipment seized was ordered suppressed, and second, although illegally seized, appellee proceeded to exhibit the same to these witnesses before their statements were taken. That fact is as clearly shown by the testimony of these witnesses hereinbefore quoted.

The Supreme Court of Hawaii did not have before it, at the time that it rendered its decision, the decision of the Supreme Court of the United States, in Nardone vs. U.S.

The decision in the Nardone case is entirely consistent with the decision of this Court in *Wiggin's vs. U.S. 64 Fed. (2d) 950.* In the Wiggin's case, the government agents obtained information from two sources, namely, the seizure of defendant's books from his office during his absence and the testimony of defendant's nurse. The nurse, prior to the seizure of defendant's books, had given the government the information concerning violations of law by the defendant, and upon the information obtained from the nurse and the information obtained from the seizure, the government obtained defendant's confession, the admissibility of which was questioned in the case.

This Court correctly held that the information of law violation by the defendant was obtained from an original source,—the nurse—and that therefore the trial Court did not commit error in admitting the same.

In the case at bar, the government had no knowledge of the existence of the electrical equipment until it was illegally seized. The witnesses did not inform the police,

prior to the seizure, of the existence of the equipment and did not make any statement until confronted with the equipment.

It is therefore respectfully submitted that the testimony of these witnesses was incompetent, irrelevant, immaterial and inadmissible, and, that the knowledge gained by the government's own wrong cannot be used by it directly or derivatively.

The Supreme Court of Hawaii erred in the manner and form as set forth in the above assignments of error.

VII.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S ACTION IN GIVING TO THE JURY TERRITORY OF HAWAII REQUESTED INSTRUCTION NO. 12, AS FOLLOWS:

> "THE COURT: YOU ARE INSTRUCTED THAT SECTION 5404 OF THE REVISED LAWS 1935 PROVIDES AS FOLLOWS,
>
> > 'POLICEMEN, OR OTHER OFFICERS OF JUSTICE, IN ANY SEAPORT TOWN, EVEN IN CASES WHERE IT IS NOT CERTAIN THAT AN OFFENSE HAS BEEN COMMITTED, MAY, WITHOUT WARRANT, ARREST AND DETAIN FOR EXAMINATION SUCH PERSONS AS MAY BE FOUND UNDER SUCH CIRCUMSTANCES AS JUSTIFY A REASONABLE SUSPICION THAT THEY HAVE COMMITTED OR INTEND TO COMMIT AN OFFENSE. YOU ARE HEREBY INSTRUCTED THAT THE TERM 'REASONABLE SUSPICION' AS USED IN SAID STATUTE IS CONSTRUED BY THE COURT TO MEAN PROBABLE CAUSE. YOU SHOULD CONSIDER THIS LAW TOGETHER WITH ALL THE EVIDENCE IN THE CASE IN DETERMINING WHETHER OR NOT DECEASED, WAH CHOON LEE, WAS LAWFULLY UPON THE PREMISES OF THE DEFENDANT AT THE TIME IN QUESTION."

WHICH IS NOT THE LAW: THAT SECTION 5404 OF THE REVISED LAWS OF HAWAII 1935, IS NULL AND VOID, IN THAT IT CONTRAVENES ARTICLE FOUR OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, IN THAT UNDER SAID SECTION, ARRESTS WITHOUT WARRANT IN MISDEMEANORS MAY BE MADE UPON PROBABLE CAUSE, WHEREAS UNDER THE CONSTITUTION ARRESTS MAY ONLY BE MADE IN THE CASE OF MISDEMEANORS WHERE THE OFFENSE IS COMMITTED IN THE PRESENCE OF THE ARRESTING OFFICER.

VIII.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S ACTION IN INSTRUCTING THE JURY OVER THE OBJECTION AND EXCEPTION OF DEFENDANT, AS REQUESTED BY THE TERRITORY OF HAWAII, IN TERRITORY OF HAWAII'S REQUESTED INSTRUCTION NO. 12A, AS FOLLOWS:

> "YOU ARE INSTRUCTED THAT IF YOU BELIEVE FROM ALL THE EVIDENCE AND BEYOND A REASONABLE DOUBT THAT THE DECEASED WAS ACTING AS A POLICE OFFICER AND THAT HE WENT UPON THE PREMISES OF THE DEFENDANT FOR THE PURPOSE OF ASSISTING ANOTHER POLICE OFFICER, AND THAT THE DECEASED IN SO DOING ACTED UNDER SUCH CIRCUMSTANCES AS WOULD JUSTIFY A REASONABLE SUSPICION BASED UPON PROBABLE CAUSE THAT SOME PERSON OR PERSONS UPON THE PREMISES HAD COMMITTED OR INTENDED TO COMMIT AN OFFENSE AGAINST THE LAWS OF THE TERRITORY OF HAWAII, THEN YOU MUST FIND UNDER SUCH CIRCUMSTANCES THAT THE DECEASED, WAH CHOON LEE, HAD A LAWFUL RIGHT THERE AND IT WAS HIS DUTY TO ENTER UPON THE PREMISES OF THE DEFENDANT AND YOU MUST NOT UNDER SUCH CIRCUMSTANCES CONSIDER THE DECEASED AS A TRESPASSER."

TO THE GIVING OF THE INSTRUCTION ABOVE SET OUT, THE DEFENDANT OBJECTED, AND STATED HER REASONS THEREFOR ORALLY IN THE JUDGE'S CHAMBERS IN THE PRESENCE OF THE ASSISTANT PUBLIC PROSECUTOR, TO-WIT: THAT SAID INSTRUCTION WAS ERRONEOUS IN LAW: THAT IT CONTRAVENED THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT UNDER SAID INSTRUCTION AN ARREST WITHOUT WARRANT IN THE CASE OF A MISDEMEANOR COULD BE MADE UPON PROBABLE CAUSE EVEN THOUGH THE OFFENSE WAS COMMITTED IN THE PRESENCE OF THE ARRESTING OFFICER AND THAT SAID INSTRUCTION WAS PREJUDICIAL TO THE DEFENDANT, AND AT THE CONCLUSION OF THE CHARGE OF THE COURT, IN THE PRESENCE OF THE JURY, BEFORE THE JURY RETIRED, THE DEFENDANT DULY EXCEPTED.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S ACTION IN GIVING TO THE JURY THE ABOVE INSTRUCTION OVER THE OBJECTION OF THE DEFENDANT, FOR THE FOLLOWING REASONS:

1. THAT SAID INSTRUCTION IS NOT THE LAW, THAT THE INSTRUCTION PERMITS ARRESTS TO BE MADE IN MISDEMEANORS, WITHOUT WARRANT AND WITHOUT THE PRESENCE OF THE ARRESTING OFFICER AND THEREFORE CONFLICTS WITH ARTICLE IV OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

2. THAT SAID INSTRUCTION WAS HIGHLY PREJUDICIAL TO DEFENDANT IN THAT IT PERMITTED THE JURY TO DETERMINE

THE RIGHT TO MAKE AN ARREST UPON ALL FACTS AS MAY OR MAY NOT HAVE BEEN KNOWN TO THE ARRESTING OFFICER.

IX.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S ACTION IN INSTRUCTING THE JURY OVER THE OBJECTION AND EXCEPTION OF DEFENDANT, AS REQUESTED BY THE TERRITORY OF HAWAII, IN TERRITORY OF HAWAII'S REQUESTED INSTRUCTION NO. 14, AS FOLLOWS:

> "YOU ARE INSTRUCTED THAT IF YOU BELIEVE FROM ALL THE EVIDENCE AND BEYOND A REASONABLE DOUBT THAT THE DECEASED WAS ACTING AS A POLICE OFFICER AND THAT HE WENT UPON THE PREMISES OF THE DEFENDANT FOR THE PURPOSE OF ARRESTING AND DETAINING FOR EXAMINATION SUCH PERSONS AS HE MIGHT HAVE FOUND THEREON, AND THAT THE DECEASED IN SO DOING ACTED UNDER SUCH CIRCUMSTANCES AS WOULD JUSTIFY A REASONABLE SUSPICION BASED UPON PROBABLE CAUSE THAT SOME PERSON OR PERSONS UPON THE PREMISES HAD COMMITTED OR INTENDED TO COMMIT AN OFFENSE AGAINST THE LAWS OF THE TERRITORY OF HAWAII, THEN YOU MUST FIND UNDER SUCH CIRCUMSTANCES THAT THE DECEASED, WAH CHOON LEE, HAD A LAWFUL RIGHT THERE AND IT WAS HIS DUTY TO ENTER UPON THE PREMISES OF THE DEFENDANT AND YOU MUST NOT UNDER SUCH CIRCUMSTANCES CONSIDER THE DECEASED AS A TRESPASSER. AND IN THIS CONNECTION YOU ARE FURTHER INSTRUCTED THAT THE FACT AS TO WHETHER OR NOT THERE WAS A 'NO TRESPASSING' SIGN UPON THE PREMISES AT THE TIME, WOULD NOT ALTER THE RIGHT OF THE DECEASED, WAH CHOON LEE, OR THE OTHER POLICE OFFICERS WITH HIM, TO BE UPON THE PREMISES IN QUESTION."

TO THE GIVING OF THE INSTRUCTION ABOVE SET OUT, THE DEFENDANT OBJECTED, AND STATED HER REASONS THEREFOR ORALLY IN THE JUDGE'S CHAMBERS, IN THE PRESENCE OF THE ASSISTANT PUBLIC PROSECUTOR, TO-WIT: THAT SAID INSTRUCTION WAS ERRONEOUS IN LAW: THAT IT CONTRAVENED THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT UNDER SAID INSTRUCTION AN ARREST WITHOUT WARRANT IN THE CASE OF A MISDEMEANOR COULD BE MADE UPON PROBABLE CAUSE, EVEN THOUGH THE OFFENSE WAS NOT COMMITTED IN THE PRESENCE OF THE ARRESTING OFFICER AND THAT SAID INSTRUCTION WAS PREJUDICIAL TO THE DEFENDANT: AND AT THE CONCLUSION OF THE CHARGE OF THE COURT, IN THE PRESENCE OF THE JURY, BEFORE THE JURY RETIRED, THE DEFENDANT DULY EXCEPTED.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S ACTION IN

GIVING TO THE JURY THE ABOVE INSTRUCTION, FOR THE FOLLOWING REASONS:

1. THAT SAID INSTRUCTION IS NOT THE LAW, THAT THE INSTRUCTION PERMITS ARRESTS TO BE MADE IN MISDEMEANORS WITHOUT WARRANT AND WITHOUT THE PRESENCE OF THE ARRESTING OFFICER AND THEREFORE CONFLICTS WITH THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

2. THAT SAID INSTRUCTION WAS HIGHLY PREJUDICIAL TO DEFENDANT IN THAT IT PERMITTED THE JURY TO DETERMINE THE RIGHT TO MAKE AN ARREST UPON ALL THE EVIDENCE IN THE CASE AND NOT UPON SUCH FACTS AS MAY HAVE BEEN KNOWN TO THE ARRESTING OFFICER.

X.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S REFUSAL TO GIVE TO THE JURY DEFENDANT'S REQUESTED INSTRUCTION NO. 16, UPON THE SUBJECT OF ARRESTS, AS FOLLOWS:

> "YOU ARE INSTRUCTED THAT A POLICE OFFICER MAY ARREST WITHOUT A WARRANT ONE GUILTY OF A MISDEMEANOR ONLY IF THE MISDEMEANOR IS COMMITTED IN THE OFFICER'S PRESENCE."

THE TERRITORY OF HAWAII OBJECTED TO THE GIVING OF SAID INSTRUCTION UPON THE GROUND THAT IT CONFLICTED WITH SECTION 5404 OF THE REVISED LAWS OF HAWAII 1935, SET FORTH IN TERRITORY'S REQUESTED INSTRUCTION NO. 12.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S REFUSAL TO GIVE SAID INSTRUCTION FOR THE FOLLOWING REASONS:

1. THAT SAID INSTRUCTION PROPERLY STATES THE LAW OF ARRESTS AND IS CONSISTENT WITH THE CONSTITUTION OF THE UNITED STATES, AND THAT SECTION 5404 OF THE REVISED LAWS OF HAWAII IS UNCONSTITUTIONAL AND VOID.

2. THAT THE REFUSAL TO GIVE SAID INSTRUCTION WAS HIGHLY PREJUDICIAL TO DEFENDANT IN THAT THE JURY WAS NOT PROPERLY INSTRUCTED UPON THE VITAL SUBJECT OF ARRESTS.

XI.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S REFUSAL TO GIVE TO THE JURY DEFENDANT'S REQUESTED INSTRUCTION NO. 18, UPON THE SUBJECT OF ARRESTS, AS FOLLOWS:

> "YOU ARE INSTRUCTED THAT TO JUSTIFY AN ARREST FOR A MISDEMEANOR WITHOUT WARRANT IT MUST HAVE BEEN COMMITTED IN THE OFFICER'S PRESENCE, AND IT IS SO

COMMITTED, WHERE HE CAN BY THE EXERCISE OF HIS OWN SENSES DETECT IT: BUT MERE SUSPICION IS NOT ENOUGH.''

THE TERRITORY OF HAWAII OBJECTED TO THE GIVING OF SAID INSTRUCTION UPON THE GROUND THAT IT CONFLICTED WITH SECTION 5404 OF THE REVISED LAWS OF HAWAII 1935, SET FORTH IN TERRITORY'S REQUESTED INSTRUCTION NO. 12.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S REFUSAL TO GIVE SAID INSTRUCTION FOR THE FOLLOWING REASONS:

1. THAT SAID INSTRUCTION PROPERLY STATES THE LAW OF ARRESTS AND IS CONSISTENT WITH THE CONSTITUTION OF THE UNITED STATES AND THAT SECTION 5404 OF THE REVISED LAWS OF HAWAII, 1935, IS UNCONSTITUTIONAL AND VOID.

2. THAT THE REFUSAL TO GIVE SAID INSTRUCTION WAS HIGHLY PREJUDICIAL TO DEFENDANT IN THAT THE JURY WAS NOT PROPERLY INSTRUCTED UPON THE VITAL SUBJECT OF ARRESTS.

THAT AS TO ASSIGNMENT OF ERRORS NOS. VII TO XI INCLUSIVE, THE DEFENDANT AT THE CONCLUSION OF THE CHARGE OF THE COURT, IN THE PRESENCE OF THE JURY, BEFORE THE JURY RETIRED, EXCEPTED TO THE CIRCUIT COURT'S RULING AS FOLLOWS:

MR. DWIGHT: ''MAY IT PLEASE THE COURT AT THIS TIME MAY I EXCEPT TO THE GRANTING BY THE COURT OF ALL OF THE PROSECUTION'S REQUESTED INSTRUCTIONS UPON MY GENERAL OBJECTION?''

THE COURT: YOU MAY.

MR. DWIGHT: TO THE GRANTING OF PROSECUTION'S REQUESTED INSTRUCTIONS NOS. 3, 4, 5, 12, 12A, 13, 14 AND 17 OVER OBJECTION, AND THE REFUSAL OF THE COURT TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS NUMBERED 1, 2, 3, 4, 8, 10, 13, 16, 18, 28, 30, 31, 32 AND 37.

THE COURT: EXCEPTION WILL BE NOTED. THE OBJECTIONS ARE ALREADY IN THE RECORD.''

(Tr. of Ev. pp. 564–565)

One of the major issues that the trial jury had to determine was the question of whether the deceased was lawfully upon the premises of appellant at the time he received the injury resulting in his death. This question was dependent upon the right of a police officer to make an arrest without warrant.

The record is devoid of any fact indicating that appel-

lant was committing any violation of law on her premises. The fact is that the Captain of the Raiding Party, Captain Caminos, knew that the defendant had violated the National Prohibition Act some ten years before the alleged crime, but had no knowledge of any violation of law at the time of the raid or at any period of time reasonably prior thereto.

His directions to officer Burns were to enter the home of the defendant and if he could make out a case of prostitution, to signal by giving three blasts upon a police whistle. Maintaining a house of ill fame under Section 6310 of the Revised Laws constitutes vagrancy and is a misdemeanor. Being a common prostitute is also under Section 6310 of the Revised Laws of Hawaii, a misdemeanor. Fornication and adultery under Sections 6241 and 6238 respectively, of the Revised Laws are also misdemeanors.

The giving by the trial Court of Territory of Hawaii's requested instructions Nos. 12, 12-A and 14 objected to by appellant, as being in conflict with the Fourth Amendment to the Constitution and refusal of the Court to give appellant's requested instructions, numbered 16 and 18 because they were in conflict with Section 5404 of the Revised Laws of Hawaii, directly raises the constitutional question. If said Section 5404 is in conflict with the Fourth Amendment, the trial Court erred in giving said instructions and in refusing to give appellant's requested instructions, which it is contended is consistent with the Fourth Amendment.

The Fourth Amendment to the Constitution of the United States prevents arrests excepting upon probable cause based upon facts and not upon suspicion in the case

of felonies and only when committeed in the presence of the officer in misdemeanors. The Fourth Amendment is a limitation upon the power of the Territorial Legislature.

"This clause stands as a limitation on the power of the Territorial Legislature."

Peacock vs. Pratt (C.C.A.) Haw. 1903 121 Fed. 772, 778.

The Fourth and Fifth Amendments are affirmations of common law principles;

U.S. vs. Tons of Coal 28 Fed. Case 16515.
Weeks vs. U.S. 232 U.S. 392.
Vachina vs. U.S. (C.C.A.) 283 Fed. 35.
Bachenberg vs. U.S. (C.C.A.) 283 Fed. 37.
U.S. vs. Solomon (1929) 33 Fed. (2) 193.

In *Vachine vs. U.S. Supra,* at page 36, this Court said;

"The Fourth Amendment to the Constitution which prohibits unreasonable searches and seizures is to be construed in conformity with the principles of the common law. At common law officers may arrest those who commit crimes in their presence and they may avert a crime in the process of commission in their presence, by arrest, and without a search warrant they may seize the instruments of the crime."

The statute makes no distinction between felonies and misdemeanors. It simply uses the word "Offense."

See *Ter. vs. Hoo Koon 22 Haw. 597. 602.*

The Fourth Amendment distinguishes between felonies and misdemeanors.

In the case of misdemeanors, arrests without warrant may be made only where the offense is committed in the

presence of the arresting officer. In the case of felonies arrests may be made upon probable cause.

Carroll vs. U.S. 267. U.S. 132.
Poldo vs. U.S. (9 C.C.A.) 55 Fed. (2) 866.
Bird vs. U.S. 4 Fed. (2) 881 (8 C.C.A.).
Baumboy vs. U.S. (9 C.C.A.) 24 Fed. (2) 512, 513.

The cases hereinbefore cited are conclusive upon this Court and it must therefore hold that under the Fourth Amendment arrests without warrant may be made in the case of misdemeanors only when the crime is committed in the Officer's presence, and, in the case of felonies arrests may be made upon probable cause, based upon facts.

As our Statute permits arrests without warrant upon probable cause in the case of misdemeanors, it contravenes the Fourth Amendment and is therefore null and void.

The Statute by its language permits arrests in both felonies and misdemeanors upon reasonable suspicion. This is also violative of the Constitution. No arrests may be made upon suspicion no matter how reasonable, in either felonies or misdemeanors.

"Mere suspicion is not enough."

Poldo vs. U.S. 55 Fed. (2) (9 C.C.A.) 512, 513.
Garske vs. U.S. 1 Fed. (2) 620.
Schultz vs. U.S. 3 Fed. Supp. 273.

"Unless such information is based on personal observation or perception it is hearsay."

Schultz vs. U.S. 3 Fed. Supp. 273.
U.S. vs. Tom You 1 Fed. Supp. 357.

Upon this latter ground, that no arrest may be made upon suspicion however reasonable, the Statute is in di-

rect violation of the Fourth Amendment and this Court should hold the same unconstitutional.

Additional reasons why the instructions given to the Court are in conflict with the Fourth Amendment are apparent from the instructions themselves.

Instruction 12, after quoting the statute, provides:

> "You should consider this law together *with all the evidence in the case* to determine whether or not the deceased . . . was lawfully on the premises of the defendant at the time in question."

The instruction permitted the jury to consider all of the facts, facts entirely unknown to the deceased, facts concerning incidents that occurred after he was dead, and, facts concerning incidents that involved evidence of prostitution in the house occurring more than a year before that he knew nothing of,—incidents which he knew nothing of, occurring in the house just prior to deceased's attempted entry,—all for the purpose of the determination by the jury if there was evidence (facts) indicating that a crime was being committed in Wah Choon Lee's presence. The only facts that could be considered were those observed by the deceased through his senses, and from no other source, therefore, in this regard the instruction was erroneous and in violation of the Fourth Amendment.

In Instruction 12a, the jury was instructed "that if they believe from *all* the evidence that the deceased went upon the premises to assist another . . . officer . . . under such circumstances as would justify a reasonable suspicion based on probable cause that some person on the premises had committed . . . an offense . . . then you must find that the deceased had a lawful right to be there. . . ."

Again the jury was permitted to determine the validity of the entry upon facts impossible of comprehension by the deceased at the time.

In Instruction 13, the jury was told that keeping a house for the purpose of prostitution was a crime that it was illegal to be a common prostitute without further defining the term, and that they could take these laws into consideration with all other evidence to determine whether Wah Choon Lee was legally on the premises, in other words, whether a crime had been committed in the presence of the officer.

In Instruction 14, the jury was told that if they believe from all the evidence, not evidence of facts comprehensible by Wah Choon Lee at the time, but all the evidence that the deceased went on the premises to make an arrest under such circumstances as would justify a reasonable suspicion based upon probable cause, that such entry was lawful.

The Supreme Court of Hawaii, in its decision, did hold that (Rec. p. 666)

> "While we believe that these instructions might well have been refused by the Court, the basis for such refusal would have been on the grounds not only that they were unsound in law but were excessively favorable to the defendant."

The lower Court further stated that the instructions were favorable because they conveyed the inference that if the deceased was a trespasser at the time he came to his death, the homicide was justifiable; that there was nothing in the record to support a finding that the deceased, at the time, intended to commit a felony; that the attending circumstances were wholly insufficient to justify a

belief of any such impending danger in the mind of a reasonable person." (Rec. p. 666–667.)

It is submitted that if the instructions were erroneous, and were objected to by Appellant, and an exception taken to the giving of the instructions, then the Supreme Court erred in sustaining the trial Court, regardless of whether the instructions were favorable or not, for the Supreme Court of the United States has said—

> "Of course in jury trials, erroneous rulings are presumptively injurious, especially those embodied instructions to the jury, and they furnish ground for reversal unless it affirmatively appears they were harmless."

Fillipan vs. Albion Vein Slate Co., 63 L. Ed. 853 at page 856.

In arriving at the conclusion that the instructions objected to by Appellant and Defendant's Instruction 34 (which was not before that Court upon any assignment of error), were favorable, and for that reason Appellant could not complain, the lower Court fell into the common error of picking out only portions of the Trial Court's charge and failing to consider the entire charge as well as the evidence.

An examination of the charge to the jury (Rec. p. 589–607) conclusively shows that the instructions were not favorable to the defendant.

Appellant's instruction No. 34, to which the Supreme Court of Hawaii was extremely critical was not before the Court upon any assignment of error. That instruction reads as follows:

> "You are instructed that a person in his own dwelling house may use such means as are necessary even to

the taking of life, to prevent a forcible and unlawful entry into his home." (Rec. p. 602.)

and the next paragraph of the Court's charge is as follows:

"To justify a homicide as in defense of habitation the accused must use no greater force than is necessary or apparently necessary to a reasonably prudent man. The force used by him must be neither greater in degree nor early or later in point of time than is necessary or apparently necessary."

Rec. p. 603

The two quoted paragraphs contain substantially the same principles of law as those set forth in the syllabus to the decision of the lower Court appearing on page 647 of the record.

There was also before the jury, considerable evidence of robberies and of annoyances from drunken soldiers.

The witness, LOU RODGERS, testified on direct examination, that the Appellant wanted to fix the home up on account of burglars and drunken soldiers (Rec. 87) that she had been robbed (Rec. p. 128) and reported it to the police but the police took finger-prints and did nothing else (Rec. p. 128); that they were disturbed on numerous occasions by drunken soldiers (Rec. p. 129) and that the electrical equipment was mostly for the protection of Appellant and Appellant's house (Rec. p. 130) that she used the equipment and received a shock (Rec. 140).

The witness, JOHN KIEHM, testified that the Appellant drove up with the witness Lou Rodgers and asked if the witness could install some kind of device to keep away soldiers (Rec. p. 190) because they came at all hours of the night and pounded on the door; that the

witness suggested the installation of a transformer that would give a shock; that the Appellant asked if the witness would guarantee that it would not kill and that he told her the shock was not strong enough to harm a person, whereupon the Appellant instructed the witness to install the apparatus (Rec. p. 191).

The witness, LUCY MCGUIRE testified that on a rainy night she received an electric shock when she touched the front door (Rec. p. 214).

There was ample evidence before the jury to warrant the Court giving the defendant's instruction thirty-four and there was evidence upon which the contention could be made that defendant's action in installing the equipment was reasonable, and necessary or apparently necessary for the protection of the Appellant's home against robberies and drunken soldiers, especially in view of the guaranty from the electrician Kiehm that the device could not harm anyone, a situation entirely different from the one suggested in the Supreme Court of Hawaii's decision concerning the installation of Spring guns.

In order for the jury to determine whether the action of Appellant in having the apparatus installed was reasonable, the question of whether or not the deceased was a trespasser became important and the Territory of Hawaii felt it necessary to have the jury instructed as set forth in the Instructions covered by this assignment of error. In fact, the main issue before the jury, was whether or not Appellant had the right to protect her habitation against robbers and drunken soldiers by installing the equipment.

The instructions, therefore, were unsound in law as found to be by the Supreme Court, and the error of the

trial Court was not harmless, but highly prejudicial. The Supreme Court of Hawaii therefore erred in the manner and form set forth in the foregoing Assignments of Error.

I.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN DISMISSING THE WRIT OF ERROR OF DEFENDANT FROM THE VERDICT, JUDGMENT AND SENTENCE OF THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII AND IN SUSTAINING THE VERDICT, JUDGMENT AND SENTENCE OF THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, WHICH JUDGMENT OF THE SUPREME COURT WAS MADE AND ENTERED ON THE 20TH DAY OF OCTOBER, 1939, PURSUANT TO A DECISION MADE AND ENTERED ON THE 20TH DAY OF OCTOBER 1939.

II.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN DISMISSING THE DEFENDANT'S PETITION FOR A RE-HEARING IN THE SUPREME COURT, WHICH DECISION WAS RENDERED AND FILED ON NOVEMBER 25TH, 1939.

XII.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S ACTION IN ACCEPTING THE VERDICT OF GUILTY OF MANSLAUGHTER, LENIENCY RECOMMENDED, FOR THE REASON THAT THE SAID VERDICT IS CONTRARY TO LAW, EVIDENCE AND WEIGHT OF THE EVIDENCE, TO WHICH RULING THE DEFENDANT DULY EXCEPTED, IN THE PRESENCE OF THE JURY AND BEFORE IT WAS DISMISSED AS FOLLOWS:

> "MR. DWIGHT: AT THIS TIME, MAY IT PLEASE THE COURT, MAY I EXCEPT UPON THE GROUND IT IS CONTRARY TO LAW, THE EVIDENCE, THE WEIGHT OF THE EVIDENCE, AND HEREBY GIVES NOTICE OF A MOTION FOR A NEW TRIAL."
> TRIAL."

XIII.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE JUDGMENT AND SENTENCE OF THE CIRCUIT COURT UPON THE VERDICT FOR THE REASON THAT THE SAME IS CONTRARY TO LAW, UPON IMPOSITION OF WHICH SENTENCE THE DEFENDANT EXCEPTED AS FOLLOWS:

> "MR. DWIGHT: MAY THE DEFENDANT SAVE AN EXCEPTION TO THE SENTENCE UPON THE GROUND IT IS CONTRARY TO LAW."

Appellant in the foregoing assignments of error assign as error, the acceptance of the verdict of the Jury, the Judgment and sentence of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, the Judgment of the Supreme Court of Hawaii sustaining the Judgment and Sentence of the Circuit Court, and the Decision of the Supreme Court denying the petition for a re-hearing.

For the reasons fully stated in the argument in this brief upon assignment Errors III to VI and VII to XI inclusive, it is submitted that the Supreme Court of Hawaii erred in the manner and form as set forth in the foregoing assignments of error.

CONCLUSION

The issues raised by this appeal are novel to the Territory of Hawaii and whatever conclusion this Court may arrive at, will have a far reaching effect upon the people of the Territory of Hawaii and will settle the future policy of law enforcement and of the gathering and production of evidence in criminal trials.

The Appellant respectfully submits that to insure to the people of Hawaii and defendants in criminal trials, the rights guaranteed to them by the Constitution, that this Honorable Court must, for the reasons stated in this brief, hold that Appellant's rights under the Fourth and Fifth Amendments to the Constitution of the United States, were violated by the admission by the trial Court of the evidence objected to, by the giving to the jury of the instructions objected to, and by the refusal of the trial Court to give Appellant's requested instructions to the jury, all as set forth in the assignments of error herein.

The Judgment of the Supreme Court of the Territory of Hawaii must therefore be reversed.

Dated at Honolulu, Hawaii, this..........13..........day of September, A.D. 1940.

Respectfully submitted,

CHARLES B. DWIGHT
Attorney for Ilene Warren
alias Speed Warren
Appellant

APPENDIX

ASSIGNMENT OF ERROR III, IV, V, VI AND VII

III.

That the Supreme Court of the Territory of Hawaii erred in holding and finding that the evidence of Edward J. Burns, a witness for the Territory of Hawaii, concerning his observations in the home of the Defendant on the night of August 3, 1937, was competent and admissible and in sustaining the ruling of the Circuit Court overruling the objection of the Defendant and in denying the motion to strike, upon the ground that the entry into the home of Defendant was illegal and violative of the Fourth and Fifth Amendments to the Constitution and that the admission of said evidence violated Defendant's rights under the Fourth and Fifth Amendments to the Constitution.

In the Circuit Court, the witness, Edward J. Burns, upon being duly sworn, testified that he was a police officer [77] having joined the Department on November 16, 1936, and worked as a foot patrolman; that on August 3, 1937, he was assigned to special duty with Captain Caminos; thereupon the Defendant objected as follows:

"Mr. Dwight: May it please the Court, at this time I want to object to the testimony of this witness upon the ground that it is incompetent, irrelevant and immaterial; * * * upon the further ground that any evidence of this witness by observation in the house was illegal and in violation of the Fourth and Fifth Amendments of the Constitution.

The Court: The Court will overrule the objection.

Mr. Dwight: Save an exception.

The Court: The exception may be saved and noted."

(Tr. of Ev. p. 201.)

The witness then testified that he was assigned by Captain Mookini to go with Captain Caminos to raid the house of the Defendant; that he left Honolulu at 5:30 P.M., arrived at Wahiawa and left the Wahiawa Police Station at 8:45 P.M., in company with Captain Kalauli, Captain Caminos and four other officers. Thereupon the Defendant again objected as follows:

"Mr. Dwight: May I have an additional ground of objection, for the record, and that is that any evidence of this witness was secured without the consent of the defendant and in violation of her rights under the Constitution.

The Court: Objection overruled.

Mr. Dwight: Exception."

(Tr. of Ev. p. 202.)

The witness then testified that the group of seven officers left the station; that he separated from the group and [78] went to Defendant's place; that he wore a grey suit and black shoes and that all of the other officers were also in civilian clothes; that on reaching Defendant's home he knocked on the wall next to the door; no one answered so he returned to the street; that he walked back and again knocked; that he saw someone look out of a window and heard footsteps; the door was opened by a woman, Billie Penland; that he followed her into the parlor and stopped by a wicker table and she asked a question, then he followed her into a room, where there

was a bed, dresser and washstand, and as she stood by, the witness took off his tie, started to remove his coat and then had a conversation as a result of which he gave the woman three dollars; that the woman took the three dollars and left the room and took with her a basin of water, when she returned he was undressing, she left and returned again, when he had completed undressing, she went to the bed and removed her robe and sat on the bed; that he reached for his clothes, took out a handkerchief, police badge and whistle, blew the whistle three times, showed her the badge and told her she was under arrest for investigation; that he blew his whistle because that was a prearranged signal between Captain Caminos and his men and the witness that they were then to raid the house.

At the conclusion of the case in chief for the Territory of Hawaii the Defendant moved to strike the testimony as follows:

> "Mr. Dwight: At this time I move to strike the testimony of Officer Burns or so much thereof as occurred subsequent to the time that he testified the defendant asked what he meant by breaking into this house, to-wit, everything that he testified to subsequent to that point [79] when defendant entered the room downstairs upon the ground that the testimony is incompetent, irrelevant and immaterial; upon the ground that it was procured in violation of the defendant's rights under the Constitution, the Fourth and Fifth Amendments, and upon the further ground that at the time he was a trespasser upon the premises of the defendant in violation of the defendant's rights under the Constitution of the United States.

The Court: Motion denied.

Mr. Dwight: May I save an exception?

The Court: Exception noted."

(Tr. of Ev. pp. 501–502.)

That the Supreme Court of the Territory of Hawaii erred in sustaining the Circuit Court's action in overruling the objections of the Defendant and in denying Defendant's motion to strike for the following reasons:

(1) That the evidence was obtained as a result of an illegal entry and search of Defendant's home, without Defendant's consent, and in violation of the Defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States, and therefore, was incompetent and inadmissible.

(2) That the evidence was highly prejudicial to the Defendant and the overruling of Defendant's objections and denial of Defendant's motion to strike was prejudicial error.

IV.

That the Supreme Court of the Territory of Hawaii erred in holding and finding that the evidence of Lou Rodgers, a witness for the Territory concerning the electrical equipment in the home of the Defendant, was competent, relevant, material [80] and admissible; and in sustaining the denial by the First Circuit Court of Defendant's motion to strike upon the ground that the testimony was obtained as a result of an illegal search and that the admission thereof incriminated Defendant and violated Defendant's rights under the Constitution and the Fourth and Fifth Amendments thereof.

At the trial in the Circuit Court, the witness upon being

duly sworn testified that the Defendant procured the material and that John Kiehm installed the electrical apparatus in the home of the Defendant; that the wires ran from the front and back doors to the transformer; the witness also located the switch and drew a picture of the transformer.

On cross-examination the witness further testified that she was questioned at the police station by Captain Hays, who exhibited to her the electrical equipment seized in Defendant's home and that every question he asked was based upon the electrical equipment and that her entire statement to the police was based upon the equipment that was in her presence and in answer to questions regarding it.

On redirect examination the witness testified that when the police had her at the station shortly after the death of Wah Choon Lee, they had some electrical equipment there and that it was the same equipment that was in the home of the Defendant when she lived there; and stated that that was how the police got the lead and that the police then questioned her as to what she knew personally about the equipment, how she knew it was in the house, how it was put in and all such things; and that all she told the police was based upon her memory and her own observations and not what she saw at the police station. (Tr. of Ev. p. 112.) Thereupon the Defendant moved to strike [81] the testimony.

The motion to strike, the ruling of the Court thereon and the exception to the ruling are as follows:

> "Mr. Dwight: At this time I move to strike the testimony of this witness upon the ground that it now affirmatively appears that the evidence the government

is now offering by virtue of placing this witness on the stand was obtained as the result of an illegal search and that this evidence tends to incriminate this defendant and violates her rights under the Fourth and Fifth Amendments to the Constitution." (Tr. of Ev. p. 119.)

"The Court: The Court is ready to rule. This evidence which Mr. Dwight asked to be stricken and excluded upon the ground that it is an invasion of the defendant's Constitutional rights under the Fourth and Fifth Amendments, in that he *argues is* based upon the evidence seized and the illegal search and seizure, is denied * * *

Mr. Dwight: May I suggest an exception?

The Court: You may."

(Tr. of Ev. p. 121.)

At the conclusion of the case in chief of the Territory of Hawaii the Defendant again moved to strike the testimony of this witness, as follows:

"Mr. Dwight: I move to strike the testimony of Lou Rodgers * * * upon the ground that any evidence that she may have given in this particular case was based entirely upon the electrical equipment * * * that was ordered suppressed by this Court and the further ground that her entire testimony was adduced at this trial from knowledge gained by the law officers * * * when they made an illegal and invalid search in contravention of [82] defendant's rights under the Constitution.

The Court: Motion denied.

Mr. Dwight: May I save an exception?

The Court: Exception noted."

(Tr. of Ev. pp. 502-503.)

That the Supreme Court of the Territory of Hawaii erred in sustaining the ruling of the Circuit Court denying the Defendant's motion to strike for the following reasons:

(1) That the evidence was obtained from an illegal source, to-wit, an illegal search and seizure, and the admission thereof was in violation of the Defendant's rights under the Constitution and the Fourth and Fifth Amendments thereof and therefore incompetent, irrelevant and immaterial.

(2) That the evidence was highly prejudicial to the Defendant and the denial of Defendant's motion to strike was prejudicial error.

V.

That the Supreme Court of the Territory of Hawaii erred in holding and finding that the evidence of John Kiehm, a witness for the Territory of Hawaii, concerning the electric equipment in the home of the Defendant was competent, relevant, material and admissible and in sustaining the Circuit Court's rulings overruling the objection of the Defendant and denying the Defendant's motion to strike the testimony, upon the ground that the same was based upon information procured during an invalid search and therefore tended to incriminate the Defendant under the Fifth Amendment and which evidence was obtained in violation of the Defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States. [83]

At the trial in the Circuit Court the witness upon being sworn testified that he was a resident of Wahiawa and an automobile mechanic; that the Defendant came to his garage and asked if he could install some device on the

door so that when a person opened it such person would receive an electric shock; that he told her he could and later purchased a transformer and installed it; that there was one wire leading to the front door and one to the back, the main wire led to a switch on the door panel; that he did not recall if he installed the switch but did connect the wires thereto; that the main wire was connected to the fuse plug and the fuse plug was connected to the ordinary wire; that the transformer was located above the living room door, one wire running to the front door, one to the back and one to the ground located outside the house; that he had a conversation with the Defendant after the apparatus was put in concerning the wiring and how to operate it; that he was an auto electrician and studied electricity.

The witness then proceeded to draw the floor plan of the home of the Defendant locating thereon the front door, the stairway, the electric switch, the transformer, the fuse plug, the manner in which the wires were connected to the front and back doors, the wires to the ground and also drew a large diagram showing the entire circuit marking thereon the fuse plug, transformer, switch and connections to the switch; and then described the switch as a knife type switch, double throw, with two wires leading to the transformer and then again drew a diagram representing the approximate size of the transformer, at which time the Defendant objected as follows: [84]

Mr. Dwight: May it please the Court, may I renew my objection? The further objection, that this witness is to reproduce evidence by an actual drawing of what this Court has suppressed. I object as incompetent, irrelevant and immaterial.

The Court: The objection will be overruled. There is no showing but what this was entirely independent of any illegal search and seizure.

Mr. Dwight: Exception.

The Court: Exception noted."

(Tr. of Ev. p. 146.)

Thereupon the witness testified as to the dimensions of the transformer; that it was about four and one-half inches wide by six inches long and about three inches thick; that the line running from the transformer to the ground outside was marked on the plan, which wire was connected to a pipe; that the wire leading to the front door was soldered onto the front screen and approached the screen from the right upper corner inside the house about an inch above the hinge.

On cross-examination the witness testified that he made a statement to the police after the police officer was killed and that he signed a statement at the police station; that it was the first statement that he made concerning the case; that at the time the statement was made the police exhibited to him certain electrical equipment which consisted of a transformer, some wires and a switch and that they were the same articles that he put into the house of Defendant. (Tr. of Ev. p. 151.)

The witness further testified that in 1936 the Defendant drove up to the shop and asked him if he could install [85] some kind of a device on the front door to keep away soldiers because they came at all hours of the night and pounded on the door; that he told the defendant he could and further told the Defendant that a transformer would give a shock; that the Defendant asked him if he would guarantee that it would not kill and that he told

the Defendant that the shock was not strong enough to harm a person and that the Defendant then asked him to install the apparatus. (Tr. of Ev. p. 152.)

On redirect examination, the witness testified that all of his evidence theretofore given was from his memory of what happened and what he had put in the house and on recross-examination he testified that the police showed him the equipment and asked him what he knew about that equipment and then the witness began to tell his story. Whereupon the Defendant moved to strike the testimony as follows:

> "Mr. Dwight: At this time I move to strike the testimony of this witness upon the ground that it is incompetent, irrelevant and immaterial; that it is based upon information procured during an invalid search and that this testimony tends to incriminate the defendant under the Fifth Amendment and was obtained in violation of the defendant's rights under the Fourth Amendment and also the further ground that the testimony was procured in violation of law."

(Tr. of Ev. p. 155.)

In a formal decision the Court denied the motion. (Tr. of Ev. p. 163–166.)

> "Mr. Dwight: May I save an exception to the Court's rule?
>
> The Court: Exception saved and noted. [86]
>
> Mr. Dwight: On the grounds stated and I renew my objections all the way through including this witness your Honor on the same ground."

(Tr. of Ev. p. 166.)

That the Supreme Court of the Territory of Hawaii

erred in sustaining the rulings of the Circuit Court overruling the objection of the Defendant and denying the defendant's motion to strike for the following reasons:

(1) That the evidence was obtained from an illegal source, to-wit, an illegal search and seizure and the admission thereof was in violation of the Defendant's rights under the Constitution and the Fourth and Fifth Amendments thereof and therefore incompetent, irrelevant and immaterial.

(2) That the overruling of the objection of the Defendant and denial of the Defendant's motion to strike was prejudicial error.

VI.

That the Supreme Court of the Territory of Hawaii erred in holding and finding that the evidence of Billie Florence Penland, a witness for the Territory of Hawaii, to the effect that the Defendant told her that she pulled the switch, was competent and admissible and in sustaining the ruling of the Circuit Court in denying Defendant's motion to strike the testimony of the witness, which motion was based upon the ground that the evidence was produced and obtained in violation of Defendant's rights under the Fourth and Fifth Amendments to the Constitution.

In the Circuit Court the witness, Billie Florence Penland, upon being duly sworn, testified that she was acquainted [87] with the Defendant and lived with her on August 3, 1937, on which day there was a raid; that officer Burns was there; that they went to the reception room; that the officer blew a whistle and some one banged on the door; that the defendant came to the door; that she

saw the defendant again on the front porch when there was a struggle with the officer; that she ran upstairs and later saw the defendant upstairs when the defendant told her to go into the closet and stay there, and that the defendant told her she turned the switch.

On cross-examination the witness testified that while she was held at the police station, the police showed her some wire, equipment, and a transformer and then they began to pump her, and that she did not make any statement to the police until the wires, transformer and door was shown to her and then they compelled her to tell what she knew about the door.

On redirect examination the witness stated that all she testified to was based upon her memory of what happened on the night of August 3rd, 1937.

Upon completion of the testimony the Defendant moved to strike as follows:

> "Mr. Dwight: At this time I move to strike the testimony of this witness upon the ground that it is incompetent, irrelevant and immaterial. The evidence was produced and obtained in violation of defendant's rights under the Fourth and Fifth Amendments of the Constitution. * * *"

(Tr. of Ev. p. 316.)

The trial Court denied the motion and the exception was duly noted, as follows:

"The Court: The motion is denied." [88]

(Tr. of Ev. p. 316.)

Mr. Dwight: Save an exception.

The Court: Exception granted."

(Tr. of Ev. p. 317.)

That the Supreme Court of the Territory of Hawaii erred in sustaining the ruling of the Circuit Court, denying the Defendant's motion to strike for the following reasons:

(1) That the evidence was obtained and adduced as a result of an illegal search and seizure, and in violation of the Defendant's rights under the Constitution of the United States and the Fourth and Fifth Amendments thereto, and was therefore incompetent and inadmissible.

(2) That the evidence was highly prejudicial to the Defendant and the denial of the Defendant's motion to strike was prejudicial error.

VII.

That the Supreme Court of the Territory of Hawaii erred in sustaining the Circuit Court's action in instructing the jury over the objection and exception of Defendant, as requested by the Territory of Hawaii, in Territory of Hawaii's requested instruction No. 12, as follows:

> "The Court: You are instructed that Section 5404 of the Revised Laws of Hawaii 1935 provides as follows:
>
> > 'Policemen, or other officers of justice, in any seaport or town, even in cases where it is not certain that an offense has been committed, may, without warrant, arrest and detain for examination such persons as may be found under such circumstances as justify a reasonable suspicion that they have committed or intend to commit an offense.'
>
> You are hereby instructed that the term 'reasonable suspicion' as used in said statute is construed by the [89] Court to mean probable cause.

You should consider this law together with all the evidence in the case in determining whether or not the deceased, Wah Choon Lee, was lawfully upon the premises of the defendant at the time in question."

To the giving of the instruction above set out, the Defendant objected, and stated her reasons therefor orally in the Judge's Chambers in the presence of the Assistant Public Prosecutor, to-wit, that Section 5404 of the Revised Laws of Hawaii 1935, incorporated in said instruction is unconstitutional and void in that under said section and instruction arrests without warrant may be made in either felony or misdemeanor upon probable cause irrespective of whether the crime was committed in the presence of the arresting officer or not; that under said section an arrest without warrant for an offense not committed in the presence of the arresting officer could be made in the case of a misdemeanor; that if any crime had been committed at the time of the entry of the officers in the home of Defendant it was a misdemeanor, and that therefore the said instruction contravened the Fourth Amendment to the Constitution of the United States; that said instruction permitted the jury to determine from all the evidence in the case, instead of only such facts as were cognizable by the officers at the time of entry, in determining whether a crime had been committed in their presence, and that the instruction was prejudicial to the rights of the defendant. At the conclusion of the charge of the Circuit Court, in the presence of the jury, before the jury retired, the Defendant duly excepted.

That the Supreme Court of the Territory of Hawaii [90] erred in sustaining the Circuit Court's action in giv-

ing to the jury the above instruction over the objections of the Defendant for the following reasons:

(1) That said instruction is not the law; that Section 5404 of the Revised Laws of Hawaii 1935, is null and void, in that it contravenes Article Four of the Amendments to the Constitution of the United States, in that under said section, arrests without warrant in misdemeanors may be made upon probable cause, whereas under the Constitution arrests may only be made in the case of misdemeanors where the offense is committed in the presence of the arresting officer.

(2) That said instruction was highly prejudicial to Defendant in that it permitted the jury to determine the legality of the arrest from all of the evidence and not from such facts as were cognizable only by the arresting officer.

(3) That said instruction was erroneous and the giving of which constituted reversible error.

DUE SERVICE AND RECEIPT OF A COPY OF THE WITHIN BRIEF IS HEREBY ADMITTED THIS 13 DAY OF SEPTEMBER, 1940.

/s/ Charles E. Cassidy

Public Prosecutor, City and County of Honolulu, Territory of Hawaii